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IN THE

Supreme Court of the United States

October Term, 1976.

No. 76-1375.

WILLIAM F. ZINGER,

Petitioner,

v.

ROBERT W. BLANCHETTE, RICHARD C. BOND and JOHN H. McARTHUR, Trustees of the Property of PENN CENTRAL TRANSPORTATION COMPANY, and PENN CENTRAL TRANSPORTATION COMPANY,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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OPINIONS BELOW.

The opinions below have not been officially reported. The opinion of the Court of Appeals is unofficially reported at 13 Employment Practice Decisions (CCH) Par. 11,467.

QUESTIONS PRESENTED.

1. Whether the retirement of the Petitioner, William F. Zinger, under Penn Central Transportation Company's "Interim Pension Plan" which paid him substantial interim pension benefits between the time of his retirement and the time he attained age 65, about 8 months later, was in violation of the Age Discrimination in Employment Act.

2. Whether the retirement of Petitioner violated the protective provisions imposed with respect to non-agreement employees in the Penn Central merger.

STATEMENT OF THE CASE.

Petitioner was employed as an attorney in the Legal Department of the Pennsylvania Railroad Company and its successor by merger, the Penn Central Transportation Company, and the Trustees thereof. He was placed on early retirement by Penn Central over his objection, effective October 11, 1974.[1] This was approximately 7½ months before Mr. Zinger reached age 65 and would in any event have retired under the Penn Central Supplemental Plan, a plan generally applicable to all Penn Central non-agreement employees.

The details of Mr. Zinger's service are set forth in the Findings of Fact by the District Court. Petition, pp. 26-27. However, Petitioner's Statement of the Case does not clearly define the three separate policies involved in his suit. He confuses the two pension plans referred to in the record and further confuses his Statement by reference to a third policy, namely, the protection extended to non-agreement employees of Penn Central under the Interstate Commerce Commission orders approving the merger of the former Pennsylvania and New York Central which took place on February 1, 1968. *New York Central-Pennsylvania Railroad-Merger,* 327 ICC 475.

During the years prior to its merger with the New York Central R.R. Co., which occurred in 1968, the Pennsylvania Railroad as early as 1962 adopted a "Plan for Interim Pensions." This essentially was a company policy under which management personnel could be placed on early retirement between ages 55 to 65 at the convenience of the company. Employees so retired were granted substantial pension payments, designed to put them in the same position as they would have enjoyed under the Railroad Retirement Act and the company's Supplemental Pension Plan, had they been 65 years of age at the time they were placed on "interim pension." The Interim Pension Plan, as indicated, was continued after the merger by the Penn Central Transportation Company, the surviving company, and was adopted by the Trustees of Penn Central following its bankruptcy on June 21, 1970. The continuation of this plan was approved by the Reorganization Court. Findings of Fact, Nos. 16-17, Petition, pp. 29-30.

When an employee who had retired "on interim" in fact reached age 65, he then shifted over to full pension status and thereafter was provided pension income from the second policy, the so-called "Supplemental Pension Plan," in addition to his statutory benefits under the Railroad Retirement Act. The Supplemental Pension Plan was one which had been established for many years and represented so far as Mr. Zinger was concerned a continuation of the former Pennsylvania Railroad plan, which dated from 1938.

The Supplemental Pension Plan is referred to in Petitioner's Statement as one to which Mr. Zinger had made contributions, although the requirement of member contributions to that plan had been ended several years before his retirement, and the company had assumed complete responsibility for contribution for pensions under that plan.

The third policy interwoven in Petitioner's Statement was the company policy applied to non-argreement employees which was adopted by Penn Central following the merger pursuant to the orders of the ICC set forth in the merger case at 327 ICC 475, especially at pages 547-552. These policies were urged by Mr. Zinger as the basis of his contention that he could not be retired prior to age 65. However, as found by the District Court, the policies referred to consistently reserved to Penn Central the right

1. Petitioner's retirement was originally set for June 1, 1974, but it was deferred at his request until October 1, 1974 and then delayed until the 11th by a restraining order.

to choose to retire any non-agreement employee between the ages of 60 and 65. Finding of Fact No. 36(2), Petition, p. 38.

In addition, the question of whether Mr. Zinger was an "employee" within the meaning of the provisions of Section 5(2)(f) of the Interstate Commerce Act which was the legal basis of the protective conditions imposed by the ICC, was raised below. The latter issue was not decided by the Court of Appeals, since it found that no violation of the protective conditions had in fact occurred. One of Petitioner's chief contentions had been that he was entitled to work to 65, as are most agreement employees.

ARGUMENT.

The Petitioner urges this Court to exercise its discretion under Rule 19 to issue a Writ of Certiorari in the present case, based in part on his assertion of a direct conflict between the decision below and that of the Fourth Circuit in *McMann v. United Airlines,* 542 F.2d 217 (1976), certiorari granted, February 20, 1976, No. 76-906. He also urges this Court to review the decision below as to Mr. Zinger's status under the conditions imposed on Penn Central for the protection of non-agreement employees in connection with the Pennsylvania Railroad-New York Central merger.

Respondents suggest that the Court should not grant certiorari in this case based on the alleged conflict with the *McMann* case.

While the Court of Appeals below did, after a thorough review of the legislative history of the Age Discrimination in Employment Act and of other authorities, refuse to accept the "far reaching" holding in the *McMann* case, that "the Act, by implication, outlaws all programs providing for involuntary retirement before age 65" (Petition, p. 49), it is clear that the decision of the Court below is in complete harmony with the great weight of authority in other Circuits. It is in accord with the holding of the Fifth Circuit in *Brennan v. Taft Broadcasting Co.,* 500 F.2d 212 (1974); the Second Circuit in *de Loraine v. MEBA Pension Trust,* 499 F.2d 49 (2d Cir.), cert. denied, 419 U.S. 1009 (1974); and the district courts in *Steiner v. National League of Professional Baseball Clubs,* 377 F. Supp. 945 (C.D. Cal. 1974), aff'd without opinion, No. 74-2604 (9th Cir. Oct. 15, 1975); *Dunlop v. Hawaiian Telephone Co.,* 415 F. Supp. 330 (D. Hawaii 1976), appeal docketed sub nom. *Usery v. Hawaiian Telephone Co.,* No. 76-2874 (9th Cir. Aug. 26, 1976) and *Dunlop v. General Telephone Co. of California,* 13 Fair Empl. Prac. Cas. 1210 (C.D. Cal. 1976), appeal docketed sub nom. *Usery v. General Telephone Co. of California,* No. 76-2371 (9th Cir. June 25, 1976). Each of these decisions held that an employee benefit plan providing involuntary retirement before age 65 was lawful by virtue of the Section 4(f)(2) exemption.

In view of the present state of the law, it is apparent that the decision in the *McMann* case represents a complete minority view. Certainly this Court's election to review the Fourth Circuit's holding is more than justified. Without in any way suggesting that this Court has indicated its views or in any way considered the merits of the *McMann* case, Respondents submit that there is no need to review the decision in the present case, which is clearly in harmony with the many other authorities referred to.

Respondents submit that when Congress provided in the Act that "it shall not be unlawful for an employer . . . to observe the terms of a bona fide . . . retirement [or] pension plan which is not a subterfuge to evade the purpose of this Act" 29 U.S.C. sec. 623(f)(2), it did two

things without question. First, it made it clear that it *is* lawful for an employer to observe the terms of a plan which is bona fide and not a subterfuge. Second, by the very nature of the words used, "bona fide" and "subterfuge", it placed the responsibility on the lower courts to determine the application of those terms, perjorative in their implications, to the facts of particular cases. Certainly the District Court and the Court of Appeals here have done no more than that.

The "conflict" between the Court of Appeals in the Third and Fourth Circuit may not exist in the light of the Fourth Circuit's repeated remarks that United Airlines there offered "no non-arbitrary justification for the age 60 retirement provision in its plan" 542 F.2d 220, and that a plan "must have some economic or business purpose other than arbitrary age discrimination." 542 F.2d 221. It is apparent that the Fourth Circuit decided only what it called a "narrow issue," i.e., whether a plan which predated the Act was by that fact alone proper and not subject to challenge on grounds of lack of good faith or subterfuge. It refused to hold that chronology alone made a difference.

The Third Circuit agreed with the view of the Fourth on this narrow point (Petition, p. 49), but reached a different result on the basis of the record before it. It may well be that the Fourth Circuit also would find "good faith" and "no subterfuge" on remand for the further proceeding which its opinion contemplates in *McMann*. But whether it would or not, it is clear that the Third Circuit has held on the record before it that the interim pension plan cannot be characterized as lacking in good faith or as being a subterfuge. The Third Circuit went beyond the Fourth in its inquiry, and made the finding which the Fourth has not yet made. As indicated its finding is essentially an examination of the terms of a clear statutory exemption in the light of the facts.

It is also clear that the Third Circuit correctly held that the exception in the statute is just that, an exception. The scope of that exception was determined in the *Zinger* case. No such determination was made in the *McMann* case which seems to write any exception out of the statute. But to correct the error in *McMann* does not require review of *Zinger*.

In addition, the present case has features which are peculiar to it and which lead to the conclusion that this Court, in its discretion, should not feel it necessary to review the case. This Court may certainly take judicial notice of the fact that under the Rail Reorganization Act of 1973, as amended, the Trustees of Penn Central, Respondents here, conveyed their rail assets to the Consolidated Rail Corporation, effective April 1, 1976, and that with that conveyance the great bulk of Penn Central's former employees became employees of Conrail. *Blanchette v. Connecticut General Ins. Corps.*, 419 U.S. 102 (1974).

The result, so far as concerns the necessity to review this case, is that very few persons will in the future be affected by the "Policy of Interim Pensions" under which Mr. Zinger was retired. That policy may apply to a few employees of the Trustees of Penn Central, but in the future, it would have no application to the great majority of former Penn Central employees who are now employed by Conrail.[2]

The present Petition, also, involves the contentions of Mr. Zinger that he was guaranteed continued employment

2. There were about 77,000 employees of Penn Central before conveyance. Conrail anticipated employing about 90,000, including those from other railroads. U.S. Railway Association, Final System Plan, Vol. 1, pp. 162-5 (July 26, 1975).

until age 65 as an "employee" protected by the merger protective conditions imposed on Penn Central by the Interstate Commerce Commission in connection with the merger with New York Central in 1968. The issues here were whether an attorney in the service of Penn Central was an "employee" entitled to protection under the merger conditions and even if so, whether the policies adopted by Penn Central prevented the early retirement of non-agreement employees. The second issue was resolved against Mr. Zinger by the Court of Appeals, which thereby found it unnecessary to decide the first issue.

The question of Mr. Zinger's rights under the merger protective conditions is very close to being a moot question. Protective benefits of the great bulk of former Penn Central employees who have become employees of Conrail are no longer defined by the ICC order, but are defined by Title V of the Regional Rail Reorganization Act, 49 U.S.C. sec. 771 *et seq.* It is most unlikely that any substantial questions as to the application of merger protection to the remaining Penn Central employees will arise.

In any case, the Petitioner's contentions as to his rights as a non-agreement employee, assuming he is so classified, are specific and limited questions. They are certainly not of general importance in the administration of federal law or policy. Furthermore, no conflicts between Courts of Appeal exist in this area. Consequently, there is no need for this Court to review Mr. Zinger's contentions with respect to his status as a protected employee.

CONCLUSION.

For the reasons stated, Respondent submits that the Petition for a Writ of Certiorari to the Court of Appeals for the Third Circuit should be denied.

Respectfully submitted,

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